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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

CITY OF BELLFLOWER et al.,

Plaintiffs and Appellants,

v.

STATE WATER RESOURCES
CONTROL BOARD et al.,

Defendants and Appellants.

B202660

(Los Angeles County Super. Ct.
No. BS101732)

APPEAL from a judgment of the Superior Court of Los Angeles County, James C. Chalfant, Judge. Affirmed.

Burhenn & Gest, Howard Gest and David W. Burhenn for Plaintiffs and Appellants.

Edmund G. Brown, Jr., Attorney General, Matthew Rodriguez, Chief Assistant Attorney General, Mary E. Hackenbracht, Senior Assistant Attorney General, and Gary Tavetian, Deputy Attorney General, for Defendants and Appellants.

Appellant Cities of Bellflower, Carson, Cerritos, Downey, Paramount, Santa Fe Springs, Signal Hill, and Whittier appeal from a judgment granting their petition for a writ of mandate ordering respondents California Regional Water Quality Control for the Los Angeles Region (Regional Board) and the State Water Resources Control Board (State Board) (collectively the Water Boards) to set aside and void certain resolutions. The trial court ordered the resolutions set aside because the environmental impact documents prepared in connection with the resolutions failed to include an analysis of alternatives to the project as required under the California Environmental Quality Act (CEQA)(Pub. Resources Code, § 21000 et seq.). On appeal, the Cities contend the trial court also should have ordered the resolutions set aside on the grounds that the documents failed to analyze the reasonably foreseeable environmental impacts of compliance with the resolutions and the reasonably foreseeable mitigation measures as required under CEQA.

The Water Boards filed a cross-appeal from the judgment. They contend the trial court abused its discretion by ordering them to set aside and void the resolutions, when the court should have simply compelled them to correct the CEQA violation by preparing an analysis of alternatives. We conclude the trial court did not abuse its discretion by ordering the Water Boards to set aside and void the resolutions, and the Cities' additional grounds for voiding the resolutions do not have merit. Therefore, we affirm.¹

STATUTORY FRAMEWORK

The Federal Water Pollution Control Act, commonly known as the Clean Water Act (33 U.S.C. § 1251 et seq.), seeks to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” by eliminating the discharge of pollutants into

¹ The Water Boards’ motions requesting judicial notice of matters that occurred subsequent to the judgment are denied. (*Lewis v. Hankins* (1989) 214 Cal.App.3d 195, 200-201.)

the navigable waters. (33 U.S.C. § 1251(a).) Under the Act, the states have the primary responsibility for developing water quality standards. (*City of Arcadia v. State Water Resources Control Bd.* (2006) 135 Cal.App.4th 1392, 1403 (*Arcadia*).)

The Act focuses on “point” and “nonpoint” sources of pollution. A point source is a “discernable, confined and discrete conveyance” such as a pipe, ditch, channel, tunnel, or conduit. (33 U.S.C. § 1362(14).) Nonpoint source pollution is not defined in the Act but has been described as water pollution that is not directly caused by discharge from a point source, such as when rainfall travels over and through the ground, carrying pollutants with it. (*Arcadia, supra*, 135 Cal.App.4th at p. 1403.)

To address point source pollution, the Act provides for the Environmental Protection Agency (EPA) to promulgate “effluent limitations” that restrict the concentrations of pollutants discharged from point sources. (33 U.S.C. §§ 1311, 1362(11); *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 620.) The primary means to enforce effluent limitations is the National Pollution Discharge Elimination System (NPDES) permit process. (*San Francisco BayKeeper v. Whitman* (9th Cir. 2002) 297 F.3d 877, 880.) “Under this approach, compliance rests on technology-based controls that limit the discharge of pollutants from any point source into certain waters unless that discharge complies with the Act’s specific requirements. 33 U.S.C. §§ 1311(a), 1362(12).” (*San Francisco BayKeeper v. Whitman, supra*, at p. 880.) The NPDES permit process does not apply to nonpoint source pollution. (*Arcadia, supra*, 135 Cal.App.4th at p. 1404.) The Act encourages states to develop waste treatment management plans to manage nonpoint sources. (*Ibid.*)

The states also promulgate “water quality standards” to establish the desired conditions for a waterway. Water quality standards allow further regulation of point sources, which are otherwise in compliance with effluent limitations, whenever necessary to ensure acceptable water quality. (*City of Burbank v. State Water Resources Control Bd., supra*, 35 Cal.4th at p. 620.)

States must identify and prioritize bodies of water for which the NPDES permit system alone fails to achieve water quality standards. (33 U.S.C. § 1313(d); *San*

San Francisco BayKeeper v. Whitman, *supra*, 297 F.3d at p. 880.) For these water bodies, states must calculate permissible levels of pollution called “total maximum daily loads” or “TMDLs.” (*San Francisco BayKeeper v. Whitman*, *supra*, at p. 880.) A TMDL is the maximum amount of a pollutant that can be discharged or “loaded” into a particular body of water from all combined sources without exceeding water quality standards. (*Arcadia*, *supra*, 135 Cal.App.4th at p. 1404.) The TMDL for a pollutant is the sum of: “(1) the ‘wasteload allocations,’ which is the amount of pollutant that can be discharged to a waterbody from point sources, (2) the ‘load allocations,’ which represent the amount of a pollutant in a waterbody attributable to nonpoint sources or natural background, and (3) a margin of safety. 40 C.F.R. §§ 130.2(g)-(i), 130.7(c)(1).” (*City of Arcadia v. United States EPA* (N.D. Cal. 2003) 265 F.Supp.2d 1142, 1144.)

TMDLs are primarily informational planning devices; they are not self-executing. (*City of Arcadia v. United States EPA*, *supra*, 265 F.Supp.2d at p. 1144.) “A TMDL does not, by itself, prohibit any conduct or require any actions. Instead, each TMDL represents a goal that may be implemented by adjusting pollutant discharge requirements in individual NPDES permits or establishing nonpoint source controls. See, e.g., *Sierra Club v. Meiburg* [(11 Cir. 2002)] 296 F.3d 1021, 1025 (‘Each TMDL serves as the goal for the level of that pollutant in the waterbody to which that TMDL applies. . . . The theory is that individual-discharge permits will be adjusted and other measures taken so that the sum of that pollutant in the waterbody is reduced to the level specified by the TMDL.’); Thus, a TMDL forms the basis for further administrative actions that may require or prohibit conduct with respect to particularized pollutant discharges and waterbodies.” (*City of Arcadia v. United States EPA*, *supra*, at pp. 1144-1145.)

“‘Once a TMDL is developed, effluent limitations in NPDES permits must be consistent with the [waste load allocations] in the TMDL.’ [Citations.]” (*Arcadia*, *supra*, 135 Cal.App.4th at p. 1404.) “For nonpoint sources, limitations on loadings are not subject to a federal nonpoint source permitting program, and therefore any nonpoint source reductions can be enforced against those responsible for the pollution only to the extent that a state institutes such reductions as regulatory requirements pursuant to state

authority. [Citation.]” (*City of Arcadia v. United States EPA, supra*, 265 F.Supp.2d at p. 1145.)

The EPA must approve or disapprove a TMDL submitted by a state for an impaired body of water within 30 days of submission. (*Arcadia, supra*, 135 Cal.App.4th at p. 1405.) “If the EPA disapproves a state’s submission, it must establish its own TMDL within 30 days of the disapproval. [Citation.]” (*Ibid.*)

In California, the State Board establishes statewide water quality control policies. (Wat. Code, § 13140.) Nine regional boards under the purview of the State Board “formulate and adopt water quality control plans, commonly called basin plans, which designate the beneficial uses to be protected, water quality objectives and a program to meet the objectives. [Citation.]” (*Arcadia, supra*, 135 Cal.App.4th at p. 1405.)

The Regional Board is responsible for developing TMDLs in conformance with the Act for waterbodies in Los Angeles and Ventura counties, including the Los Angeles River and Ballona Creek. (*City of Arcadia v. United States EPA, supra*, 265 F.Supp.2d at p. 1147.) Typically, the Regional Board staff submits draft TMDLs for the board to adopt as amendments to the Regional Board’s plan, known as the basin plan. (*Ibid.*) After adoption by the Regional Board, “Basin Plan amendments are then submitted to the State Board, and then subsequently to the [Office of Administrative Law (OAL)]; after they have been approved by both of these agencies, they are submitted to [the] EPA.” (*Ibid.*)

PROCEDURAL REQUIREMENTS IMPOSED BY CEQA

CEQA requires governmental agencies to identify the environmental effects of a proposed project, as well as feasible alternatives or mitigation measures that would lessen or avoid the adverse effects. (*Arcadia, supra*, 135 Cal.App.4th at pp. 1420-1421.) ““If there is no substantial evidence a project “may have a significant effect on the environment” or the initial study identifies potential significant effects, but provides for mitigation revisions which made such effects insignificant, a public agency must adopt a

negative declaration to such effect, and, as a result, no [environmental impact report (EIR)] is required.” (*Id.* at p. 1421.) If a project may have a significant effect on the environment, the agency must prepare an EIR. (*Ibid.*)

A state agency with a regulatory program can be exempted from CEQA’s requirements for preparation of initial studies, negative declarations and EIRs, if the Secretary of the California Resources Agency certifies that the agency’s program meets certain criteria. (*Arcadia, supra*, 135 Cal.App.4th at p. 1421.) The Water Boards’ basin planning process is a certified regulatory program. (Pub. Resources Code, § 21080.5; *Arcadia, supra*, 135 Cal.App.4th at p. 1422-1423.)

Certified programs require documents that are the “functional equivalent” of the negative declaration or EIR that would be required under CEQA. (*Arcadia, supra*, 135 Cal.App.4th at p. 1422.) An environmental document used as a substitute for an EIR must include alternatives to the proposed activity and mitigation measures to minimize significant adverse effects on the environment. (*Ibid.*)

Section 21159 provides for expedited environmental review of environmentally mandated projects by certain specified agencies, including the Water Boards. (Pub. Resources Code, § 21159.4.) Under Public Resources Code section 21159, the Water Boards must perform “an environmental analysis of the reasonably foreseeable methods of compliance” when adopting “a rule or regulation requiring the installation of pollution control equipment, or a performance standard or treatment requirement.” The environmental analysis must include: “(1) An analysis of the reasonably foreseeable environmental impacts of the methods of compliance. [¶] (2) An analysis of reasonably foreseeable feasible mitigation measures. [¶] (3) An analysis of reasonably foreseeable alternative means of compliance with the rule or regulation.” (Pub. Resources Code, § 21159, subd.(a).)

“[T]he agency may utilize numerical ranges or averages where specific data is not available; however, the agency shall not be required to engage in speculation or conjecture.” (Pub. Resources Code, § 21159, subd.(a).) “The environmental analysis shall take into account a reasonable range of environmental, economic, and technical

factors, population and geographic areas, and specific sites.” (*Id.*, subd.(c).) However, the agency is not required to conduct a project level analysis. (*Id.*, subd.(d).)

Moreover, the Regional Board is allowed to perform a “first tier” environmental analysis. “‘Tiering’ or ‘tier’ means the coverage of general matters and environmental effects in an [EIR] prepared for a policy, plan, program or ordinance followed by narrower or site-specific [EIRs] which incorporate by reference the discussion in any prior [EIR] and which concentrate on the environmental effects which (a) are capable of being mitigated, or (b) were not analyzed as significant effects on the environment in the prior [EIR].” (Pub. Resources Code, § 21068.5; Cal. Code Regs., tit. 14, §§ 15152, 15385; *Koster v. County of San Joaquin* (1996) 47 Cal.App.4th 29, 36; *Friends of the Santa Clara River v. Castaic Lake Water Agency* (2002) 95 Cal.App.4th 1373, 1383.)

“Tiering is appropriate when the sequence of EIRs is: [¶] (a) From a general plan, policy, or program EIR to a program, plan, or policy EIR of lesser scope or to a site-specific EIR. [¶] (b) From an EIR on a specific action at an early stage to a subsequent EIR or a supplement to an EIR at a later stage. Tiering in such cases is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe.” (Cal. Code Regs., tit. 14, § 15385.)

“Tiering does not excuse the lead agency from adequately analyzing reasonably foreseeable significant environmental effects of the project and does not justify deferring such analysis to a later tier EIR or negative declaration. However, the level of detail contained in a first tier EIR need not be greater than that of the program, plan, policy, or ordinance being analyzed.” (Cal. Code Regs., tit. 14, § 15152, subd.(b).) “Where a lead agency is using the tiering process in connection with an EIR for a [general plan,] the development of detailed, site-specific information may not be feasible but can be deferred, in many instances, until such time as the lead agency prepares a future environmental document in connection with a project of a more limited geographical scale, as long as deferral does not prevent adequate identification of significant effects of the planning approval at hand.” (*Id.*, subd.(c).) “Additionally, a first-tier EIR may

contain generalized mitigation criteria and policy-level alternatives.’ [Citation.]” (*Koster v. County of San Joaquin, supra*, 47 Cal.App.4th at p. 37.)

“Once ‘the required findings as to environmental impacts have been made, a public agency may still adopt a project with adverse environmental consequences, provided it either adopts mitigation measures or finds that overriding considerations justify the project notwithstanding unmitigated adverse consequences. [Citations.]’ (*No Slo Transit, Inc. v. City of Long Beach* (1987) 197 Cal.App.3d 241, 257[.])” (*Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal.App.4th 351, 374, fn. 10.)

FACTS AND PROCEDURAL BACKGROUND

In addition to the federal mandate imposed by the Act, the federal court entered a consent decree in *Heal the Bay, Inc. v. Browner* (N.D. Cal. 1999) No. C 98-4825 SBA that requires the EPA to establish TMDLs for particular pollutants, including certain metals, in particular bodies of water in the Los Angeles region, including the Los Angeles River and Ballona Creek, unless state agencies create satisfactory TMDLs by specified dates. In May 2000, the EPA established the California Toxics Rule setting water quality criteria in numeric form for metals in California waters, specifically cadmium, copper, lead, and zinc. (40 C.F.R. § 131.38(b)(1).)

The Regional Board staff drafted metals TMDLs for the Los Angeles River and Ballona Creek. The staff prepared technical reports for each TMDL explaining the manner in which numeric targets and loading capacity were allocated to point and nonpoint sources. Each report includes a section regarding implementation of the TMDL, including the reasonably foreseeable means of compliance with the TMDLs and associated costs. The reports stated that municipalities could employ a variety of strategies to meet their waste load allocations. Methods to achieve compliance with the TMDLs, referred to as “best management practices” (BMPs), include more frequent storm drain catch basin cleaning, improved street cleaning with more efficient vacuum-assisted street sweepers, public education, and the installation of structural BMPs such as

infiltration trenches and sand filters. A small, dedicated facility for diversion and treatment of runoff could be implemented to meet the TMDL requirements. Specific projects which might have a significant environmental impact would be subject to an environmental review and the lead agency for subsequent projects would be obligated to mitigate any impacts that they identified.

The reports set forth an implementation schedule. However, the Regional Board intends to reconsider the metals TMDLs in five years to re-evaluate the waste load allocations based on data from special studies.

The report for the Los Angeles River estimated a potential implementation strategy would cost \$1.4 billion for construction and \$153 million for annual maintenance. The Ballona Creek report estimated a similar strategy in that area would cost \$335 million for construction and \$37 million for annual maintenance. The reports noted that implementation of other TMDLs could contribute to implementation of the metals TMDLs. For example, the Los Angeles River Trash TMDL and the Ballona Creek and Wetlands Trash TMDL, which were in their first year of implementation, require permittees to install capture systems or other controls. The reductions in metals loading that were already being achieved through the BMPs instituted under the Trash TMDLs need to be documented. The reports also noted that the suggested strategies, in addition to achieving compliance with the metals TMDLs, could be used to achieve compliance with the Trash TMDL, the upcoming Los Angeles River Bacteria TMDL and the upcoming Ballona Creek and Estuary Toxics and Bacteria TMDLs. Therefore, the cost analyses reflected the potential costs of compliance with multiple TMDLs based on likely implementation scenarios. The first phase of the implementation strategy would include nonstructural BMPs, such as increasing the frequency and improving the efficiency of street sweeping. If nonstructural BMPs adequately implement the waste load allocations, then additional controls would not be necessary.

The Regional Board staff prepared environmental checklists to address the environmental impacts that might be caused by implementation of the metals TMDLs. The checklists stated that there was a potential environmental impact on earth conditions,

because structural BMPs could disrupt the soil by increasing the rate at which water is discharged to the ground. However, the checklists concluded that properly designed structural BMPs placed in areas where risks to soil disruption are minimal could mitigate this potential adverse impact to less than significant levels.

The checklists reported a potential environmental impact as to air quality if the implementation strategy incorporated urban runoff treatment facilities. Specifically, construction and operation of urban runoff treatment facilities, including temporary increased traffic during construction, could result in increased air emissions. However, any potential air emissions would be subject to regulation by the applicable air pollution control agency and specific treatment facility construction projects would require a separate CEQA review process. The impacts could be significant, but any significant impacts that could not be mitigated would be of limited duration and were outweighed by the necessity to implement the metals TMDL.

The staff also found several potential environmental impacts on water conditions. For example, if compliance with the TMDL were achieved through diversion of storm water from open channels to wastewater or urban runoff treatment facilities, it could result in a change in fresh water movement. The staff considered this impact to have a positive effect though, as it would reduce the potential for flooding during storms. The checklist concluded that the potential impact of reductions in water flow in dry weather would require a separate CEQA review addressing project-specific environmental impacts.

Similarly, the checklist stated that the treatment strategy selected might result in diversion and storage of a portion of storm water, altering its current course of flow in the river. However, if the treatment strategies were properly sited and designed, they would not reduce the flood control function of the Los Angeles River and the impacts would be less than significant. In fact, they would likely reduce peak floodwater flows, which would be a positive impact.

A change in the quantity of groundwater might occur if compliance was achieved through significant infiltration of storm water runoff. Although the staff anticipated a

potential positive impact, if infiltration devices were not properly sited and constructed, groundwater quality could be adversely impacted. The potential for adverse impacts, however, could be mitigated through proper design and siting of infiltration devices and through groundwater monitoring.

The checklists noted that unless structural BMPs are properly designed and constructed to allow for bypass of storm water during storms which exceed design capacity, the proposal could create flooding hazards. However, the proposal could also reduce flooding hazards by reducing peak storm flows in the Los Angeles River and tributaries by diverting and retaining water on-site via infiltration.

As to the impact on animal life, the checklists stated that diverting runoff to treatment facilities could change the amount of surface water, which could have a potentially significant adverse effect on aquatic life habitat. However, the flow required for aquatic life habitat would likely be maintained from groundwater and publicly owned treatment works. In addition, any diversion project would be required to assess and mitigate potential impacts to aquatic life habitat. Moreover, even if there were a significant reduction in wildlife habitat, the environmental benefits of the project, specifically water quality that is not toxic to the wildlife, override the marginal losses in habitat.

The staff analyzed the impact on land use, considering that land might need to be provided for storage, diversion of treatment facilities. The staff concluded that projects could be designed to coordinate the need for parks and wildlife habitat with the need to improve water quality.

The checklists noted that construction of structural BMPs could increase existing noise levels. However, the potential for increased noise levels due to construction are limited and short-term. The potential impacts could be reduced by limited or restricting construction hours.

The staff found an impact on public services based on the need for increased maintenance of public facilities, specifically diversion facilities or structural BMPs, and additional road maintenance associated with some of the nonstructural BMPs, such as

increased storm drain catch basin cleanings and improved street cleaning. Moreover, there would be a need for increased monitoring to track compliance with the TMDLs. Nonstructural BMPs, such as education and outreach, would require new or altered government services.

With respect to the impact on parking, the staff concluded that existing parking facilities might be altered to incorporate infiltration or other structural BMPs to treat storm water. The staff noted that structural BMPs could be designed to accommodate space constraints and would not significantly decrease the amount of parking available in existing parking facilities. Of course, temporary alterations to traffic patterns might occur during construction of facilities, but the potential impacts would be limited and short-term. The potential impacts could be reduced by limiting or restricting construction hours.

The checklists stated that there could be a potential human health hazard, if facilities were not properly designed to control mosquitoes. This potential adverse impact could be mitigated by designing systems that minimize stagnant water conditions and/or by requiring oversight and treatment of the systems by vector control agencies.

The chosen implementation strategy could result in the installation of storage, diversion or treatment facilities and structural BMPs that could be aesthetically offensive if not properly designed, sited and maintained. However, many structural BMPs are designed to provide habitat, recreational areas, and green spaces in addition to improving storm water quality.

The staff found no foreseeable impact from light and glare, no impact on housing, and no impact on existing recreational opportunities.

The staff prepared responses to comments received from the public. In response to public comments that certain facilities might require lighting for safety reasons, the staff responded that the location of the facility could reduce the impact of increased lighting. The staff also noted in response to comments that the structural BMPs could be specifically designed to accommodate limited land area, so it was not reasonably foreseeable that permittees would need to displace housing.

The Regional Board held public workshops and hearings, and reviewed the staff reports, draft metals TMDLs, environmental checklists, and responses to public comments. The checklist for the Los Angeles River was executed on March 25, 2005, and the checklist for Ballona Creek was executed on March 28, 2005. After further hearings and responses to public comments, on June 17, 2005, the Regional Board adopted Resolution No R05-006, amending the basin plan for the Los Angeles Region to incorporate the metals TMDL for the Los Angeles River. On July 15, 2005, the Regional Board adopted Resolution No. 05-007 for Ballona Creek. The resolutions state that the staff reports, environmental checklists, staff responses to public comments, and the resolutions constitute the substitute documents required for a tier 1 environmental review under CEQA.

Each resolution included the following statement of overriding considerations: “The proposed amendment could have a significant adverse effect on the environment. However, there are feasible alternatives, feasible mitigation measures, or both that would substantially lessen any significant adverse impact. The public agencies responsible for those parts of the project can and should incorporate such alternatives and mitigation into any subsequent projects or project approvals. Possible alternatives and mitigation are described in the CEQA substitute documents, specifically the TMDL [staff] report and the Environmental Checklist. To the extent the alternatives, mitigation measures, or both are not deemed feasible by those agencies, the necessity of implementing the federally required metals TMDL and removing the metals-related toxicity impairment from the [body of water at issue] (an action required to achieve the express, national policy of the Clean Water Act) outweigh the unavoidable adverse environmental effects.” ~ (AR 8301[LA]; 18592 [Ballona])~

The State Board reviewed the proposed regulations and additional public comments. On October 20, 2005, the State Board approved the amendments to the basin plan to incorporate metals TMDLs for the Los Angeles River and Ballona Creek as adopted in the Regional Board resolutions. The OAL and the EPA also approved the basin plan amendments.

The Cities are located in Los Angeles County and are co-permittees to a permit issued by the Regional Board that applies to storm water and urban runoff that collects in their storm sewer system and discharges directly into the Los Angeles River, Ballona Creek and other water bodies in Los Angeles County. The Cities will have to implement compliance programs and controls to meet the waste load allocations in the metals TMDLs.

On February 16, 2006, the Cities filed a petition for writ of mandate challenging the resolutions of the Water Boards. The operative amended petition filed on July 3, 2006, sought a writ of mandate ordering the Water Boards to set aside: (1) Regional Board Resolution No. R05-006, amending the basin plan to incorporate a TMDL for metals in the Los Angeles River and its tributaries; (2) Regional Board Resolution No. R05-007, amending the basin plan to incorporate a TMDL for metals in Ballona Creek (the Ballona Creek metals TMDL); and (3) State Board Resolution Nos. 2005-0077 and 2005-0078 approving the basin plan amendments. In addition, the Cities requested an order declaring the Los Angeles River and Ballona Creek metals TMDLs void and a writ of mandate ordering the Regional Board prepare, circulate and consider a new and legally adequate EIR or functional equivalent or otherwise comply with CEQA in conjunction with any future metals TMDLs for the waters at issue.

The Cities raised multiple issues in their petition, including that the environmental documents prepared by the Regional Board staff violated CEQA by failing to consider alternatives to the project, failing to adequately analyze the reasonably foreseeable environmental impacts associated with the TMDLs, failing to adequately consider and analyze reasonably foreseeable mitigation measures, and providing an inadequate statement of overriding considerations.

The trial court analyzed the Cities' arguments in substantial detail in its statement of decision. The court found that within the scope of a first tier environmental review, the Regional Board had met CEQA requirements to assess the reasonably foreseeable environmental impacts of the methods of compliance and discuss feasible mitigation measures. All environmental impacts were reduced to less than substantial levels or

properly mitigated. The court concluded that the statement of overriding considerations was flawed, because the Regional Board did not find that the alternatives or mitigation measures were not feasible, but the Regional Board did not need to rely on the statement of overriding considerations for the very reason that there were no reasonably foreseeable impacts that were not mitigated.

The trial court found the substitute EIR violated CEQA, however, because it did not contain a description of reasonable alternatives to the project as a whole. The documents failed to expressly discuss a “no project” alternative, although the trial court acknowledged that there was no viable no project alternative. But the Cities had suggested two potentially feasible alternatives: limiting the scope of the project by adopting metals TMDLs that applied only to impaired reaches, rather than all reaches, and/or only to reaches where the beneficial uses were designated as probable, rather than merely potential. The Water Boards’ failure to conduct any alternatives analysis, including the no project analysis and the two potentially feasible alternatives raised by the Cities, required the trial court to grant the petition and issue a writ of mandate solely on the issue of the defective alternatives analysis.

On July 13, 2007, the trial court issued a peremptory writ of mandate ordering the Water Boards to void and set aside State Board Resolution Nos. 2005-0077 and 2005-0078, and void and set aside Regional Board Resolution Nos. R05-006 and R05-007. In addition, the court ordered the Water Boards to cease and suspend all activities taken pursuant to the resolutions until the Water Boards had taken the necessary actions to bring adoption of the resolutions into compliance with CEQA.

The Cities filed a notice of appeal as to the portion of the judgment that did not find additional violations of CEQA. The Water Boards filed a notice of appeal as to the remedy imposed to set aside and void the resolutions.

DISCUSSION

Standard of Review

“In determining whether to grant a petition for traditional mandamus on the ground that an administrative body failed to comply with CEQA in making a quasi-legislative decision, the court may consider only ‘whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.’ (Pub. Resources Code, § 21168.5.)” (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 568.)

““When the informational requirements of CEQA are not complied with, an agency has failed to proceed in ‘a manner required by law’ and has therefore abused its discretion.” [Citation.] Furthermore, “when an agency fails to proceed as required by CEQA, harmless error analysis is inapplicable. The failure to comply with the law subverts the purposes of CEQA if it omits material necessary to informed decisionmaking and informed public participation. Case law is clear that, in such cases, the error is prejudicial.” [Citation.]’ [Citations.] ““Our task on appeal is ‘the same as the trial court’s.’ [Citation.] Thus, we conduct our review independent of the trial court’s findings.” [Citation.]’ (*City of Arcadia v. State Water Resources Control Bd.*, *supra*, 135 Cal.App.4th [at p.] 1409.)” (*California Sportfishing Protection Alliance v. State Water Resources Control Bd.* (2008) 160 Cal.App.4th 1625, 1644-1645.)

“As we have stated previously, ‘[o]ur limited function is consistent with the principle that “[t]he purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind. . . .” [Citation.]’ ‘We look “not for perfection but for adequacy, completeness, and a good faith effort at full disclosure.” ([Cal. Code Regs., tit. 14, art. XI,] Guidelines, § 15151.)’ [Citation.]” (*River Valley Preservation Project v. Metropolitan Transit Development Bd.* (1995) 37 Cal.App.4th 154, 178.)

However, we review the remedy imposed by the trial court for an abuse of discretion. The abuse of discretion standard measures whether the trial court's act falls within the permissible range of options under the law. (*Department of Parks & Recreation v. State Personnel Bd.* (1991) 233 Cal.App.3d 813, 831.) “‘Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an “abuse” of discretion.’ [Citation.]” (*Id.* at p. 831, fn. omitted.)

Remedy Under Section 21168.9

The Water Boards contend the trial court abused its discretion by ordering them to set aside and void the resolutions. They argue that the court should have compelled them to correct the CEQA violation by performing an analysis of alternatives. We find no abuse of discretion.

The trial court may order one or more remedies under section 21168.9 as appropriate to achieve compliance with CEQA. “‘When a court finds that a public agency failed to comply with CEQA, it must do one or more of the following: (1) mandate that the agency vacate the determination, finding, or decision in whole or in part; (2) if the court finds that a specific project activity will prejudice the consideration or implementation of mitigation measures or project alternatives and could result in an adverse physical environmental change, mandate that the agency and any real party in interest suspend specific activity until the agency complies with CEQA; (3) mandate that the agency take specific action necessary to comply with CEQA. (§ 21168.9, subd. (a).) The court must specify what action by the agency is necessary to comply with CEQA (§ 21168.9, subd. (b)) but cannot direct the agency to exercise its discretion in a particular way (§ 21168.9, subd. (c)).’ (*Federation of Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1266[.])” (*San Bernardino Valley Audubon Society v. Metropolitan Water Dist.* (2001) 89 Cal.App.4th 1097, 1102-1103.)

“[S]ection 21168.9 is a specific application of the general rule contained in Code of Civil Procedure section 1094.5, subdivision (f): ‘The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in the light of the court's opinion and judgment and may order respondent to take such further action as is specifically enjoined upon it by law, but the judgment shall not limit or control in any way the discretion legally vested in the respondent.’” (*San Bernardino Valley Audubon Society v. Metropolitan Water Dist.*, *supra*, 89 Cal.App.4th at p. 1103.)

“Section 21168.9 thus gives trial courts the option to void the finding of the agency (§ 21168.9, subd. (a)(1)), or to order a lesser remedy which suspends a specific project activity which could cause an adverse change in the environment (§ 21168.9, subd. (a)(2)), or to order specific action needed to bring the agency's action into compliance with CEQA (§ 21168.9, subd. (a)(3)). The choice of a lesser remedy involves the trial court’s consideration of equitable principles. [Citations.]” (*San Bernardino Valley Audubon Society v. Metropolitan Water Dist.*, *supra*, 89 Cal.App.4th at p.1104.)

In this case, the trial court found that the documents prepared as substitute EIRs did not comply with CEQA, because they failed to consider alternatives to the project as a whole. Therefore, the Water Boards’ resolutions adopting amendments to the basin plan were findings and decisions made without compliance with CEQA. Section 21168.9 sets forth remedies for CEQA violations, but does not require the court to order a particular remedy. The court was authorized under subdivision (a)(1) of section 21168.9 to order the Water Boards to set aside and void the resolutions adopting amendments to the basin plan that were based on the incomplete environmental analyses. The court was familiar with the statute and case law allowing it discretion to fashion remedies based on equitable considerations. The court was aware that it could order the Water Boards to take specific action to bring the resolution into compliance, but also that it could not direct the agencies to exercise their discretion in any particular way. The court concluded

that the only appropriate remedy under the circumstances of the case was to set aside the resolutions in their entirety, because the resolutions were adopted in reliance on the defective CEQA analysis, the TMDLs were not severable from the defective CEQA analysis, and the Water Boards might not choose to adopt the same TMDLs after the environmental documents were prepared in compliance with CEQA. The case did not concern specific project activities taking place pursuant to the resolutions that could prejudice the Water Boards' consideration of mitigation measures or alternatives, or the court's discretion under section 21168.9, subdivision (2), to suspend such activities until the agencies took action to bring the resolutions into compliance with CEQA. It was within the court's discretion to order the resolutions set aside and to require that any new resolutions adopting metals TMDLs comply with CEQA.

The Water Boards rely on *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 423-424 and *City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1456 to argue that the proper remedy for a CEQA violation is to compel the agency to correct the defect without voiding or suspending the agency action. This is incorrect. *Laurel Heights* and *City of Santee* hold that a trial court has authority under section 21168.9 to enjoin all activities pending certification of a proper EIR, but the court is not required to enjoin the activities and may employ traditional equitable principles in deciding whether injunctive relief is appropriate. We note that in both cases, ongoing project activities were not suspended, but the public entities were ordered to set aside their resolutions certifying defective EIRs and consequently, the project approvals. To proceed, the agencies had to certify proper EIRs and reapprove the projects. *Laurel Heights* and *City of Santee* do not require the court to order any particular remedy or prevent the trial court from setting aside any action that violates CEQA.

Additional CEQA Issues Raised by the Cities

The Cities contend the trial court should have found Regional Board's substitute EIR failed to set forth the reasonably foreseeable environmental impacts of compliance with the metals TMDLs and the reasonably foreseeable mitigation measures. We have examined the Cities' contentions and concluded that they are without merit. Therefore, we decline to address the specific contentions.

Under section 21005, when a reviewing court vacates an action taken by a public agency for failure to comply with a requirement under CEQA, it must specifically address any additional alleged CEQA violations that it finds to have merit. (*Friends of the Santa Clara River v. Castaic Lake Water Agency, supra*, 95 Cal.App.4th at p. 1387.) The reviewing court is not required to specifically address contentions concerning additional defects that it examines and finds to be without merit. (*Ibid.*)

“In reviewing the adequacy of the findings in the [EIR], we are guided by the principle that EIR requirements must be sufficiently flexible to encompass vastly different projects with varying levels of specificity. [Citation.] ‘The degree of specificity in an EIR need only correspond to the degree of specificity involved in the underlying activity which is described in the EIR.’ [Citations.] Thus, an EIR on the adoption of a general plan, such as is under scrutiny here, must focus on secondary effects of adoption, but need not be as precise as an EIR on the specific projects which might follow. [Citations.] The difficulty of assessing future impacts of adopting a general level plan does not excuse preparation of an EIR, but merely reduces the level of specificity demanded and shifts the focus to secondary effects. [Citation.] [¶] In all cases, the sufficiency of the information contained in an EIR is reviewed in light of what is reasonably feasible. [Citations.] At minimum, an EIR ‘must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.’ [Citation.]” (*Rio Vista Farm Bureau Center v. County of Solano, supra*, 5 Cal.App.4th at pp. 374-375.)

We conclude from our review of the substitute documents prepared by the Regional Board, as did the trial court, that the documents complied with the requirement to address the reasonably foreseeable environmental impacts from methods of compliance and set forth mitigation measures to minimize any significant adverse environmental impacts. The environmental review adequately examined and evaluated the environmental impacts of the proposed project in all pertinent areas of consideration and mitigation measures, as would a first tier environmental review prepared under CEQA. “This is not a case in which the Regional Board merely offered a checklist that denied the project would have any environmental impact and ‘obviously intended its documentation to be the functional equivalent of a negative declaration.’ (Cf. *City of Arcadia v. State Water Resources Control Bd.*, *supra*, 135 Cal.App.4th [at p.] 1423[.])” (*California Sportfishing Protection Alliance v. State Water Resources Control Bd.*, *supra*, 160 Cal.App.4th at p. 1645.) Therefore, we reject the Cities additional contentions concerning CEQA violations.

DISPOSITION

The judgment is affirmed. The parties are to bear their own costs on appeal.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J.

MOSK, J.